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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/972,575	10/05/2001	Joseph C. Walsh	P 5.78(a) CVL	4977
7590	12/31/2003			
Michael A. Goodwin, Esq. Klaas, Law, O'Meara & Malkin, P.C. Suite 2225 1999 Broadway Denver, CO 80202			EXAMINER MAI, TRI M	
			ART UNIT 3727	PAPER NUMBER
			DATE MAILED: 12/31/2003	

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/972,575

Applicant(s)

WALSH ET AL.

Examiner

Tri M. Mai

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,2,4,6-9,11,13-18 and 28-33 is/are pending in the application.
- 4a) Of the above claim(s) 6 and 13 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1,2,4,7-9,11,14-18 and 28-33 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 15
- 4) ☐ Interview Summary (PTO-413) Paper No(s) ____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

Election/Restrictions

1. Claims 6, and 13 are withdrawn from further consideration as being drawn to a different invention as set forth in Paper No. 4.

Claim Rejections - 35 USC § 112

2. Claims 1, 2, 4, 7, 8, 9, and 11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 recites moving said lid into an open position, in which the product can be dispensed. Furthermore, the claim recites “the sheet of material covering said hole”. It appears that the claim is missing an opening structure to enable the product to be dispensed. The claim is incomplete for omitting essential structure, in this case another opening to enable the product to be dispensed, such omission amounting to a gap between the steps. See MPEP § 2172.01.

Likewise, claim 8 recites “a second open condition in which the product can be dispense”. Furthermore, the claim recites “the sheet of material covering said hole”. The claim is incomplete for omitting essential structure, in this case another opening to enable the product to be dispensed, such omission amounting to a gap between the steps. See MPEP § 2172.01.

In claim 2, 9, “Flip Top” is a trade name (see 4948038, col. 7, ln 14). Thus, the use of “Flip Top” renders the claim indefinite.

Claim Rejections - 35 USC § 103

3. Claims 1, 2, 4, 7, 8, 9, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Flemming (2583211) in view of Brooks (2434756), or in the alternative, over Flemming in view of Brooks and Kalajian (3259297). Flemming meets all claimed limitations except for the

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sheet of material covering the hole. Brooks teaches that it is known in the art to provide a sheet of covering material. It would have been obvious to one of ordinary skill in the art to provide a sheet of covering material 16. It would have been obvious to one of ordinary skill in the art to provide a sheet of covering material in Flemming as taught by Brooks to further protect the contents.

With respect to the limitation of the product can be dispensed, contents can be dispensed in a variety of means, e.g., providing another opening in the container like puncturing another hole in the container or providing second unobstructed opening means.

In the alternative, it would have been obvious to one of ordinary skill in the art to enable the container of Flemming in view of Brooks can be dispensed while the hole is closed as shown in Kalajian by providing a straw to enable the container to be consumed in various manners.

4. Claims 1, 2, 4, 7, 8, 9, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Meyers (4284197) in view of Niepmann (2434756). Meyers teaches a container with a lid, a panel 60a as shown in Figs. 7 and 8 comprising a stationary portion 60a and a hinge portion 108. Note that portion 108 is hinged to panel 26a about the fold line defined by line 80a. Meyers meets all claimed limitations except for the sheet of material. Niepmann teaches that it is known in the art to provide a sheet of material 17. It would have been obvious to one of ordinary skill in the art to provide a sheet of material in Meyers as taught by Niepmann to provide added protection.

It would have been obvious to one of ordinary skill in the art to provide portion 17 with a fluid impervious material, e.g., plastic to provide an alternative material for protecting the inside product.

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5. Claims 28, 29, 31, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over either Froom (4431129) or Stone (5314114) in view of Hodapp (3146936). Stone teaches a container with 1st, 2nd, 3rd, and 4th walls, a panel 56 forms in the 4th wall, and the hole at portion 50 to be opened closed with panel 56. Froom teaches a container with 1st, 2nd, 3rd, and 4th walls, a panel forms in the 4th wall, and the hole at portion 21 to be opened closed. Either Stone or Froom meets all claimed limitations except for the lid movably attached to the third wall. Hodapp teaches that it is known in the art to provide the lid movably attached to the third wall as shown in Fig. 2 via hinge 21. It would have been obvious to one of ordinary skill in the art to provide the lid movably attached to the third wall in either Froom or Stone as taught by Hodapp to provide the desired location for the hinge and to hold the container easily.

Please note that the term "flip top lid" does not impart any structure over the lid in Rossi.

6. Claims 14-18, 28-33 are rejected under 35 U.S.C. 102(b) as anticipated by Rossi (3133689) or, in the alternative, under 35 U.S.C. 103(a) as obvious over Rossi in view of Flemming (2583211).

Rossi teaches a container with a 1st and 2nd walls 30, 17, a lid 37 movably attached to the first wall 30 via a fold line as shown in Fig. 5, and a hinge portion at 51.

To the degree it is argued that portion 51 is not a hinge portion. Flemming teaches that it is known in the art to provide a hinge portion at as shown in Fig. 5. It would have been obvious to one of ordinary skill in the art to provide a cut out with a hinge portion in Froom as taught by Flemming to enable reengagement easily.

Response to Arguments

7. Applicant's arguments filed 09/23/03 have been fully considered but they are not persuasive. Specifically with the rejection of Flemming in view of Brooks, applicant made an assertion that this combination would not teach the limitation "product can be dispensed". As set forth above, since the claim do not recite any specific structure that would enable this functional limitation. The rejection of Flemming in view of Brook would meet this limitation. It is noted that the claims must be distinguished from the prior art in term of structure rather than function. In re Danly, 263 F.2d 844, 847(CCPA 1959). Furthermore, apparatus claims cover what a device is, not what a device does, Hewlett-Packard Co. v. Bausch & Lomb Inc., 909 F. 2d 1464, 1469 (CCPA 1935). See MPEP 2114. In this case there is no structural distinction between the claim and the combination.

Furthermore, even to the degree that plastic closes the opening, it is submitted that contents can be dispensed in a variety of means, e.g., providing another opening in the container like puncturing another hole in the container or providing second un obstruct opening means, such as shown in the Kalajian reference as set forth in the alternative combination above. Other arguments are moot in view of the new rejections, .

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Tri M. Mai whose telephone number is (703)308-1038. The examiner can normally be reached on 7:30am-5:00pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lee W Young can be reached on (703)308-2572. The fax phone number for the organization where this application or proceeding is assigned is (703)872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703)308-1148.

Tri M. Mai
Primary Examiner
Art Unit 3727

T Mai